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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
KING COUNTY DEPARTMENT OF
PUBLIC WORKS, SOLID WASTE
DIVISION,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

PCHB Nos. 85-54, 85-55,
and 85-95

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of three Notices of Violation and three \$1,000 civil penalties for allowing the emission of an air contaminant from the Cedar Hills Landfill site in the Maple Valley-Issaquah area on January 8, January 16, and February 27, 1985, came on for hearing before the Pollution Control Hearings Board on August 7, 1985, in Seattle, Washington. Seated for and as the Board were Lawrence J. Faulk, Wick Dufford and Gayle Rothrock (presiding). The proceedings

1 were officially reported by Lynn Tarry of Calmes and Associates.
2 Respondent elected a formal hearing pursuant to RCW 43.21B.230.

3 Appellants were represented by Jack Johnson, Deputy Prosecuting
4 Attorney for King County. Respondent Agency was represented by its
5 attorney Keith D. McGoffin.

6 By agreement the testimony of witnesses was by affidavit. There
7 was no cross examination. Exhibits were entered. Brief argument was
8 heard. Transcripts were entered. From the testimony, evidence, and
9 contentions of the parties, the Board makes these

10 FINDINGS OF FACT

11 I

12 Respondent PSAPCA, pursuant to RCW 43.21B.260, has filed with this
13 Board a certified copy of its Regulation I, and all amendme
14 thereto, which is noticed.

15 II

16 Appellant King County owns and operates a sanitary landfill--the
17 Cedar Hills Landfill--located at 16645-228th Avenue SE, Maple Valley,
18 Washington. They have owned and operated the site since 1964 through
19 their Department of Public Works, Division of Solid Waste. The Solid
20 Waste Division operates six transfer stations, waste transfer
21 vehicles, some rural landfills and the subject landfill site.

22 Waste and garbage is ultimately brought to the subject site,
23 compacted, piled, covered, and its gas vented from several active
24 flare jets. The site is actively operated seven days a week at least
25 eight and one-half hours a day, is patrolled at night, and is open all

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1 seasons of the year, receiving 2,600 tons of residential and
2 commercial garbage annually.

3 III

4 At times some odors emanate from the landfill and waft across the
5 site boundaries into a neighborhood nearby. Such odors may be either
6 from new garbage or, more likely, decomposing garbage waste which
7 exists under anaerobic conditions.

8 IV

9 In the late afternoon of January 8, 1985, acting on complaints
10 from neighbors who live one-half mile northwest of the landfill,
11 respondent Agency's inspector visited and spoke with the complainants
12 and personally sniffed and detected odors at each of four residences,
13 where odors were objectionable enough to cause attempts at avoidance.
14 The complainants stated that the effect was "nauseating" and smelled
15 like rotting garbage and rotten eggs. Some complainants were
16 experiencing throat irritation, headache, and upset stomach.

17 In affidavits relating to the event, the complainants stated their
18 ability to distinguish garbage from other odors. They also stated
19 their families have experienced unreasonable interference with the
20 enjoyment of the outdoors and their property. The odors were labeled
21 as disgusting, unbearable and pervasive.

22 The inspector, at the time he arrived, noted the rotting garbage
23 and hydrogen sulfide smell and rated the odor as equivalent of a "3"
24 on an odor rating scale ranging from 0 to 4, and delineated as
25 illustrated:

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1 0--No detectable odor

2 1--Odor barely detectable

3 2--Odor distinct and definite, any unpleasant
4 characteristics recognizable

5 3--Odor strong enough to cause attempts at avoidance

6 4--Odor overpowering, intolerable for any appreciable
7 time

8 This rating scale is used by PSAPCA not as a regulatory standard, but
9 as a shorthand method for preserving impressions for evidentiary
10 purposes.

11 V

12 The inspector stated that a slight inversion existed during his
13 site visit and investigation of complaints received. No other spec
14 weather conditions were noted.

15 Three hours after arriving in the area and documenting the odors,
16 PSAPCA's inspector proceeded to the landfill. He left a business card
17 and four field notices of violation. Additionally he notified the
18 division manager about a non-working flare. On March 12, 1985, Notice
19 and Order of Civil Penalty No. 6227 was issued for \$1,000. The
20 penalty was appealed to this Board on April 12, 1985, and became our
21 cause number PCHB No. 85-54.

22 VI

23 On the morning of January 16, 1985, acting on a complaint, another
24 of respondent Agency's inspectors visited the neighborhood adjacent to
25 the landfill and spoke with a resident who lives approximately

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1 one-half mile east of the landfill. The inspector accepted a written
2 complaint from the resident and independently noted an offensive
3 rotting garbage odor which, he concluded, could induce nausea, curb
4 the appetite, cause nose and throat irritation, congestion, and
5 generally offend the senses of smell and taste.

6 By affidavit the complainant stated an ability to distinguish
7 odors and the conviction that what was detected downwind of the
8 landfill was the smell of garbage. She stated that the odor so
9 permeated her property as to make her experience a constant headache
10 and worry about the safety and health of her children who are also
11 bothered by the odors. She labeled the odor of January 16 "a terrible
12 stench" and said it made her sick when she went outside.

13 VII

14 The inspector stated that the wind was blowing from the landfill
15 toward complainant's property at one to five miles per hour and the
16 area was covered in fog.

17 Based on each of these factors, the inspector determined a
18 violation of PSAPCA Regulation I was occurring and sought to contact a
19 responsible official at the landfill site. She was told to mail any
20 notice of violation to the county's downtown offices. On March 12,
21 1985, Notice and Order of Civil Penalty No. 6228 was issued to the
22 county for \$1,000. The penalty was appealed to this Board on April
23 12, 1985, and became our cause number PCHB No. 85-55.

24 VIII

25 On the early evening of February 27, 1985, again resulting from an
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1 accumulation of odor complaints, a PSAPCA inspector visited homes of
2 five people near the Cedar Hills Landfill.

3 Through formal written complaints, that evening's odor was
4 described as "very bad spoiled garbage smell" and "heavy sour cabbage
5 smell." It was also listed as nauseating and physically irritating.
6 The complainants, by affidavit, said that since 1981, they had
7 experienced nauseating garbage odors which permeate their properties.
8 Their quality of life both inside and outside the home is severely
9 affected with increasing regularity by the nauseating smell of
10 uncovered and rotten garbage.

11 PSAPCA's inspector was advised by the complainants that the odor
12 that evening was severe. The inspector, on site at various
13 complainants' homes and properties detected a rotten garbage and
14 hydrogen sulphide odor with unpleasant characteristics, strong enough
15 to make attempts at avoidance. He stated that the odor was also
16 prevalent at the Cedar Hills Alcoholism and Substance Abuse Center and
17 at the Extended Care Unit located at 16200-227th Avenue, SE, very
18 close by.

19 The inspector proceeded to the landfill but could not gain
20 entrance. Six notices of violation were issued the next day to the
21 county.

22 On April 29, 1985, Notice and Order of Civil Penalty No. 6267 was
23 issued for \$1,000. The penalty was appealed to this Board on May 29,
24 1985, and became our cause number PCHB No. 85-95.

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IX

The appellant County in these cases does not contend that the effects experienced on the dates in question did not occur. Neither did the County show that any of the complainants or inspectors possessed idiosyncratic sensibilities. The county acknowledged the Cedar Hills Landfill occasionally generates unpleasant odors.

The Board finds on the record before it, that the odors complained of emanated from the landfill and were, in fact, offensive to persons of normal sensitivity; and that they did, in fact, unreasonably interfere with the enjoyment of good health, life, and property on each of the dates involved here.

X

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B and 70.94 RCW.

II

The notices and orders of civil of penalty at issue assert violations of both Section 9.11(a) of PSAPCA Regulation I and WAC 173-400-040(5). Since we here decide that Section 9.11(a) was violated, we need not consider WAC 173-400-040(5).

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III

On January 8, 1985, January 16, 1985, and February 27, 1985, odors emanating from the Cedar Hills Landfill site wafted onto nearby residential properties and on the latter occasion were detectable at the Cedar Hills Alcoholism and Substance Abuse Treatment Center and had such effects on human health and the enjoyment of life and property as to violate Section 9.11(a) of respondent's Regulation I.

IV

King County alleges that (1) PSAPCA has failed to adopt its odor test by rule; (2) that PSAPCA's odor standards are unconstitutionally vague; and (3) that civil penalties in the amount of \$1,000 per violation are improperly high.

V

Under terms of Section 9.11(a) of PSAPCA Regulation, certain air emissions are prohibited.

(a) It shall be unlawful for any person to cause or allow the emission of any air contaminant in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property.

This formulation parallels the definition of "air pollution" contained in the State Clean Air Act at RCW 70.94.030(2). The language is similar to the traditional definition of a nuisance. See RCW 7.48.010.

An agency regulation couched in such terms is consistent with the statute. Cf. Kaiser Aluminum v. Pollution Control Hearings Board, 33 Wn App. 352, 654 P.2d 723 (1982).

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VI

PSAPCA's odor regulation has been adopted by rule. That is what Section 9.11(a) is. Appellant's real complaint here seems to be the lack of a so-called "objective" or "quantitative" standard. However, nuisance-type verbal formulae have long been enforced by the courts here and in other states and are clearly contemplated by the Clean Air Act. See Kaiser Aluminum, supra.

What PSAPCA has not adopted is the odor scale its inspectors sometimes use to rate events. Appellants characterize this rating scale as a "test" and state it is less sophisticated than other tests or measurements known to be used in other regulatory circumstances. There is no reason why this scale cannot be used as shorthand for evidentiary purposes in attempting to demonstrate violations of the substantive nuisance-type standard. Documented narrative complaints from impacted neighbors additionally serve as a form of an "odor panel" of raters who have gained considerable familiarity with and experience in these matters, albeit involuntarily.

VII

It has been long established that the Pollution Control Hearings Board cannot answer constitutional questions. We express no judgment about King County's constitutionality argument. Yakima Clean Air Authority v. Glascam Builders, 85 Wn.2d 255, 534 P.2d 33 (1975).

VIII

PSAPCA's Regulation I and the Washington State Clean Air Act provide for a maximum civil penalty of \$1,000 per day in occurrences of

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1 this kind. In consideration of all the facts and circumstances, e
2 conclude the civil penalties levied in these three cases were not
3 excessive.

4 IX

5 Any Finding of Fact which is deemed a Conclusion of Law is hereby
6 adopted as such.

7 From these Conclusions of Law, the Board enters this
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ORDER

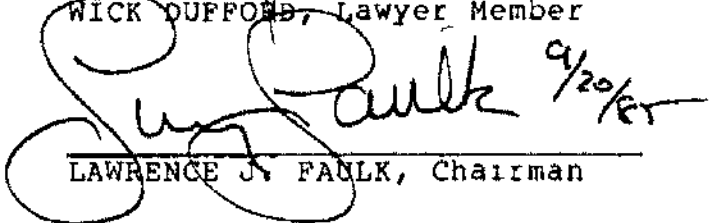
Notice and Order of Civil Penalty Numbers 6227, 6228, and 6267
issued by PSAPCA are affirmed.

DONE this 23rd day of September, 1985.

POLLUTION CONTROL HEARINGS BOARD


GAYLE ROTHROCK, Vice Chairman


WICK DUFFORD, Lawyer Member

 9/20/85
LAWRENCE J. FAULK, Chairman